

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Application for Leave
to Appeal under and in terms of Section
5C(1) of the High Court of the Provinces
(Special Provisions) (Amendment) Act,
No. 54 of 2006.

Pathirannahalage Deepal Pathirana,
No. 100, Horagolla,
Warakapola.

Supreme Court Case No:

SC/App/83/2017

SC/HCCA/LA No: 13/2017

PLAINTIFF

Civil Appellate High Court Kegalle

Case No. SP(HCCA) KEG 07/2016 Vs.

DC/Kegalle/Case No:

7294/L

1. Eranda P. Abeyrathna,
“Inoka”, Piladuwa,
Parakrama Mawatha, Warakapola.
2. Rohan Salinda Paranagama,
(ceased the office)
Herath Mudiyanseelage Lal
Hemantha Bandara Herath,
(Substituted)
Basnayake Nilame,
Mahanuwara Sri Paththini
Dewalaya, Kandy.

DEFENDANTS

AND BETWEEN

Rohan Salinda Paranagama,
(Ceased the office)
Herath Mudiyanseelage Lal Hemantha
Bandara Herath,
(Substituted)
Basnayake Nilame,
Mahanuwara Sri Paththini Dewalaya,
Kandy.

2nd DEFENDANT-PETITIONER

Vs.

Pathirannahalage Deepal Pathirana,
No. 100, Horagolla,
Warakapola.

PLAINTIFF-RESPONDENT

Eranda P. Abeyrathna,
“Inoka”, Piladuwa,
Parakrama Mawatha, Warakapola.

1st DEFENDANT-RESPONDENT

AND NOW BETWEEN

Herath Mudiyanseelage Lal Hemantha
Bandara Herath,
Basnayake Nilame,
Mahanuwara Sri Paththini Dewalaya,
Kandy.

SUBSTITUTED 2ND
DEFENDANT-PETITIONER-
PETITIONER

Vs.

Pathirannahalage Deepal Pathirana,
No.100, Horagolla,
Warakapola.

PLAINTIFF-RESPONDENT-
RESPONDENT

Eranda P. Abeyrathna,
“Inoka”, Piladuwa,
Parakrama Mawatha, Warakapola.

1st DEFENDANT-
RESPONDENT-RESPONDENT

BEFORE : YASANTHA KODAGODA, P.C., J.
MENAKA WIJESUNDERA, J.
K. M. G. H. KULATUNGA, J.

COUNSEL: Widura Ranawake with Menaka Warnapura instructed by Shyamal Rathnayake for the Substituted 2nd Defendant-Appellant.

Chandana Wijesooriya with U. Wijesuriya and C. Weerasinghe instructed by Ms. Wathsala Dulanjani for the 1st Defendant-Respondent-Respondent.

ARGUED ON : 29.01.2026

DECIDED ON : 15.09.2026

JUDGMENT**K. M. G. H. KULATUNGA, J.**

1. The plaintiff-respondent-respondent (hereinafter referred to as “the plaintiff”) instituted action in the District Court of Kegalle bearing No. 7294/L against the 1st defendant. The dispute between the plaintiff and the 1st defendant arose out of an agreement to sell (‘Pa1’). The issue in this Court arises out of an Order made under section 175(2) of the Civil Procedure Code (CPC).
2. The plaintiff has agreed to construct another floor to the building of the property which is the subject matter of the dispute. It appears that this was proposed to be a condominium property. The agreement was that the plaintiff would within 6 months from 15.10.2005, complete the construction and convey the ground floor to the 1st defendant. The 1st defendant, on his part, has paid a sum of Rs. 1 million, and upon the completion of the construction and at the point of handing over and conveyance of the property, he would pay an additional sum of Rs. 500,000/-. The plaintiff in this action claims that the 1st defendant has prevented him from entering the premises and carrying out the construction, which prevented him from completing the construction within the stipulated period. As such, by this action, the plaintiff is seeking an extension of the time for him to perform his part of the agreement and contract.
3. The 1st defendant, by his answer, set up a cross-claim, *inter alia*, for specific performance, being the transfer of the property as agreed, and for a declaration that he is entitled to have the property so transferred. It appears that the 1st defendant has been in occupation of the ground floor of the building, running a business, and another part was to be constructed under the agreement. The 2nd defendant-petitioner-appellant (hereinafter referred to as “the 2nd defendant”) intervened and claimed ownership to the land in question.

4. Whilst the trial was progressing, the 2nd defendant by mutual agreement commenced his case and gave evidence before the 1st defendant. Then, the 1st defendant commenced his case. During the course of his evidence, the 1st defendant moved to mark and produce four deeds as “IV4” – “IV7”. When the 1st defendant moved to mark the said deeds, the 2nd defendant’s counsel objected on the basis that they have not been listed as required by section 121(2) of the CPC (as the law stood then). Upon recording the objection, the learned Trial Judge reserved the Order, and the same was delivered on 10.03.2016 (P-7). The learned District Judge by the said Order overruled the objection and allowed the 1st defendant to mark and produce the said documents.

5. The 2nd defendant, being aggrieved by this Order, preferred an appeal to the Civil Appellate High Court of Kegalle. The learned Judges of the Civil Appellate High Court by the impugned Order dated 29.11.2016, did affirm the said Order but did not agree with the reasons given by the District Judge and gave their own reasons with reference to section 175(2), relying on the decisions of **Girantha v. Maria**, 50 NLR 519 and **Kandaiya v. Wishwanadan** (1991) 1 SLR 269. The 2nd defendant, being aggrieved, preferred this appeal.

6. This Court granted leave on the following questions of law:
 1. *Whether the Civil Appellate High Court erred in law by allowing the marking of documents at this stage of the trial even without an application before the court under and in terms of the proviso to the Section 175 of the Civil Procedure Code;*
 2. *Whether the Civil Appellate High Court failed to consider the serious prejudice which would be caused to the petitioner by allowing the documents be tendered in evidence after conclusion of petitioner’s case as he would not be having an opportunity to reply; and*
 3. *Whether any prejudice would be caused to the 2nd defendant by permitting to mark the documents 1V4 – 1V7.*

7. When this matter was taken up for argument, the learned Counsel for the appellant submitted that leave was granted to the 1st defendant to tender the documents under section 175(2) of the CPC without there being an application seeking leave. The argument advanced is that a court cannot grant leave and allow a party to produce a document under section 175(2) unless it is preceded by a formal application for leave. It was further submitted that prejudice will also be caused to the 2nd defendant.
8. It is common ground that the documents purported to be marked were not listed as required by the pre-amended section 121(2) as the law that prevailed then. It is on this basis that the objection was raised. On the perusal of the proceedings of 28.10.2015, the learned Counsel for the 1st defendant has moved to mark four deeds to establish title. The learned Counsel for the 2nd defendant also submitted that these documents are not referred to in the pleadings and the 2nd defendant was thus taken by surprise. It was also submitted that the documents were not put to the 2nd defendant when he was cross-examined.
9. The counsel for the 1st defendant has brought to the notice of the court two additional lists in the record with the date stamps 03.05.2012 and 21.10.2012. However the first day of trial was 03.08.2010. Thus, the objection was raised and the impugned Order was accordingly made on 10.03.2016. Considering the aforesaid sequence of events, when the objection was raised, the learned Trial Judge, upon recording the objection, reserved the Order.
10. The learned Trial Judge observed that there is no motion tendered with the additional lists of documents, though additional lists of documents had come into the record and was found with the date stamp. The lists included the deeds proposed to be marked. It is also observed by the District Judge that copies of these lists have been made available to the 2nd defendant's Registered Attorney. However, the Trial Judge did

observe that the said list has not been filed or tendered in the manner as required by section 121(2) of the CPC. However, the Trial Judge observed that there is an irregular practice in that court to tender and file lists in this manner. In these circumstances, the Trial Judge found that it is not a fit matter to reject these documents and thus overruled the objection and allowed the 1st defendant to mark and produce the said document.

11. Section 175 was amended by the Civil Procedure Code (Amendment) Act, No. 29 of 2023. Section 175 of the CPC, as it was then, read as follows:

“175. (1) *No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party as provided by section 121:*

Provided, however, that the court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid;

Provided also that any party to an action may be called as a witness without his name having been included in any such list.

(2) *A document which is required to be included in the list of documents filed in court by a party as provided by section 121 and which is not so included shall not, without the leave of the court, be received in evidence at the trial of the action:*

Provided that nothing in this subsection shall apply to documents produced for cross examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory.”

The amended section reads thus:

“175. (1) *No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party as provided by subparagraph (i) of paragraph (b) of section 79B or permitted by court under section 142D:*

Provided, however, that the court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid,

Provided also that any party to an action may be called as a witness without his name having been included in any such list.

(2) *A document which is required to be included in the list of documents filed in court by a party as provided by subparagraph (ii) of paragraph (b) of section 79B and which is not so included or not permitted by court under section 142D shall not, without the leave of the court, be received in evidence at the trial of the action:*

(3) *Where an order is made under this section, the court shall take into consideration any order made under section 142B.*

Provided that nothing in this subsection shall apply to documents produced for cross examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory.”

The pre-trial procedure was introduced, and section 121(2) was repealed. Subsections (b)(i) and (b)(ii) of section 79B, brought in by the said amendment, require parties to file the list of witnesses and documents before the case is fixed for the pre-trial conference. However, section 175, as amended, continued to retain the provisions in respect of calling unlisted witnesses and producing unlisted documents as it was before.

12. Whilst section 175(1) provides for leading of witnesses, section 175(2) provides for the leading of unlisted documents. The formulation of sections 175(1) and (2) are different. Section 175(1), dealing with unlisted witnesses, contains a proviso conferring the discretion on Court. In contrast, section 175(2) enables the Court to grant leave to produce an unlisted document. It is in this context that His Lordship Justice Samayawardhena, considering section 175(1) in ***Niyakulage Dilruk Sanjeewa Fernando v. Diyagama Vidanelage Somawathie Perera*** (SC Appeal No. 01/2025, decided on 10.02.2025), opined as follows:

“According to the second proviso to section 175(1), a party to the action can be called as a witness whether or not his name is included in the list. The Court could also allow an unlisted witness to be called “if special circumstances appear to it to render such a

course advisable in the interests of justice". It may be noted that section 175(2) adopts a more flexible approach regarding unlisted documents, allowing such documents to be marked with the "leave of the court", without the need to establish "special circumstances" as required for unlisted witnesses. However, in both instances, the Court must exercise its discretion judicially, not arbitrarily, in accordance with sound principles of law and judicial precedent."

13. Having said so, I will now consider if section 175(2) requires a formal application for leave to be made in a particular form. The words "*without the leave of the court*" used in the context of section 175(2), as I see, does not contemplate a formal application for leave. It means no more than with permission of Court. I say so upon considering the totality of section 175. Subsection (1) deals with unlisted witnesses, and it is by way of a proviso that a discretion is conferred upon Court. That too, on certain specific grounds. Whereas in subsection (2), the discretion is conferred by the substantive provision and not by way of a proviso. In contrast to subsection (1), the statute does not specify any ground on which the court may exercise its discretion. Thus, as observed by Justice Samayawardhena, section 175(2) adopts a more flexible approach regarding unlisted documents. No particular procedure is laid down to seek leave. Accordingly, it is not possible, by way of an interpretation, to read into this provision an additional requirement which the legislature has not provided for.

14. The exercise of the discretion vested under section 175(2) may arise when a party, either by way of motion or otherwise, seeks leave to tender in evidence an unlisted document. When such an application is made, the Trial Judge is required to consider the said application to grant leave. Secondly, without expressly or formally making such an application, a party may attempt to produce an unlisted document during the course of evidence being led, as done in the present matter. It may be seen as an attempt to smuggle in an unlisted document, and at that stage, opposing counsel ought to be vigilant and object to such document being so tendered. The Court will then embark upon considering the said

objection. In doing so, the Court will act under section 175(2) and make a suitable order. In this scenario, there may not be a formal application that precedes, but there will be a decision on the objection upon hearing the parties. The application is there. This is the inveterate practice and procedure that is followed in our civil Courts. When a Trial Judge, upon considering such an objection, overrules the same and makes order permitting such party to produce an unlisted document, that, in fact, is granting of leave to lead such document on an application. In these circumstances, the argument of the learned Counsel for the appellant does not impress me and is thus is misconceived.

15. Now, to consider the merits of the impugned Order, it is necessary to consider the requisites that should be present to allow the belated leading of a document without it being formally listed. As to the requisites as laid down in **Kandiah v. Wisvanathan and Another** (1991) 1 Sri L.R. 269 and several other decided authorities, they are as follows:

- i. where it is required in the interest of justice to do so [**Read v. Samsuddin** 01 NLR 292; **Fernando v. Fernando** 7 NLR 147; **Killanchiya v. Clarke** 2 Weer 80, 2 Leader 153; **Jones v. Chennell** 8 Ch. D. 506; **Andris Hamy v. Dinneris Appu** 2 Times 161, 162];
- ii. that it is considered as being paramount to ascertain the truth [**Girantha v. Maria** 50 NLR 519];
- iii. where there is no doubt as to the authenticity of the document (certified copies of public documents or judicial proceedings); and
- iv. where sufficient reasons are adduced for the failure to list the documents.

16. On a perusal of the proceedings, it is apparent that the five documents proposed to be produced were deeds to establish the title of the 1st defendant. According to the observations of the District Judge, it is also

apparent that subsequent lists of documents had reached the record; however, it had not been accompanied by a motion. Thus, it remains that additional lists have been filed of record, upon the intervention of the second defendant.

17. In ***Kandiah v. Wisvanathan and Another*** (supra), several reasons are specified therein as matters that may be considered in the exercise of discretion under section 175(2). As I observe, on an evaluation of such grounds there is no mandatory requirement to satisfy all requisites, as they are standalone grounds that may be considered singularly or in combination. If the production of a particular document is found to be in the interest of justice or paramount to ascertain the truth, then whatever may be the reason for the failure to list, the court may allow such document to be led in evidence provided there be no substantial prejudice caused to the other party. If the other party is shown to have been so prejudiced by the sudden leading of the document, then it may be allowed, subject to a suitable order to mitigate such prejudice.

18. In this instance they are title deeds to establish the title of the subject matter of the agreement to sell between the plaintiff and the 1st defendant. As observed by the learned District Judge, two additional lists have been found in the record, maybe even filed irregularly. This appears to have been done with notice to the other party. That being so, the other party appears to have had reasonable notice, though the procedure followed was flawed and not regular. If at all, this is a procedural non-compliance. As a rule, the prescribed procedure is required to be complied with; however, the non-compliance should not result in the impeding of the administration of justice, especially when circumstances exist to satisfy that no prejudice had been caused to the opposing party and that the non-compliance is more of a technical nature.

19. In **Girantha v. Maria** 50 NLR 519, Gratien, J. (at page 522), observed that, in exercising discretion under section 175 of the CPC where it is sought to call a witness whose name was not in the list filed before the trial,

“...the paramount consideration is the ascertainment of the truth and not the readily understandable desire of a litigant to be placed at a tactical ‘advantage’ by reason of some technicality.”

The same dicta was followed in subsequent decisions of the Superior Courts, such as **Casie Chetty v. Senanayake** (1999) 2 Sri LR 11; **Farose Ahmed v. Mohamed and Another** (2006) 2 Sri LR 66; and in **Fernando v. Perera** (SC Appeal No. 01/2025) (supra). Further, in **L. H. G. Elias v. Anton Gajasinghe and Mujahid A. Cader** (SC Appeal 50/2008), Suresh Chandra, J., held as follows:

“For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law.”

Accordingly, I find that the learned Civil Appellate High Court Judge was correct in upholding the conclusion of the learned District Judge. In these circumstances, I see no basis to interfere with the said judgment.

20. Then the learned Counsel for the appellant submitted that the Civil Appellate High Court failed to consider the existence of special circumstances and that the 1st defendant did not submit any special circumstances to warrant the exercise of the discretion under section 175(2). On a close analysis of sections 175(1) and 175(2), and as observed by His Lordship Justice Samayawardhena in **Fernando v.**

Perera (supra), it is plain and apparent that ‘*special circumstances*’ are required and contemplated by section 175(1) and its proviso in respect of unlisted witnesses. Correspondingly, this requirement is not contained in subsection (2), in respect of unlisted documents. Accordingly, it is not legally possible to read into and include such requirement by a process of interpretation. On the contrary, the express absence of such requirement will mean that it is not required under section 175(2). If I may elaborate, when in two separate subsections a discretion is conferred and a particular requirement or precondition is expressly specified and provided in one such subsection and is excluded from the other, the necessary implication is that such requirement or qualification is not required for the second subsection, which does not include the same. N. S. Bindra’s Interpretation of Statutes (8th Ed., at page 148) articulates this principle thus:

***“Expressio unius est exclusio alterius.* —**

The express mention of one thing implies the exclusion of another. This maxim is a product of logic and common sense. No doubt this rule is neither conclusive nor of general application and is to be applied with great caution. It may be applied only when in the natural association of ideas, the contract between what is provided and what is left out leads to an inference that the latter was intended to be excluded.”

21. The Civil Appellate High Court, by the said judgment dated 29.11.2016, affirmed the conclusion of the District Judge, but for different reasons. The Civil Appellate High Court proceeded to permit the production of the said documents on the basis that it was in the interest of justice and necessary to elicit the truth. On this basis, the Civil Appellate High Court found that it was a fit matter to exercise the discretion under section 175(2) in favour of the 1st defendant.

22. As to prejudice, I find that even in an irregular form, an amended list has been filed of record. It also is observed that the said additional list had been so tendered with notice to the 2nd defendant. Considering this fact, there appears to have been sufficient notice afforded to the 2nd defendant. Further, as they are deeds to establish title as against the

claim of the 2nd defendant, I see no prejudice caused to the 2nd defendant as alleged.

23. In the above circumstances, the questions of law are answered in the negative. Accordingly, I find that the appellant had failed to satisfy this court of any valid reason to interfere with the impugned judgment of the Civil Appellate High Court.

24. Thus, this appeal is dismissed. However, we make no order as to costs.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

MENAKA WIJESUNDARA, J.

I agree.

JUDGE OF THE SUPREME COURT